BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD OF THE STATE OF CALIFORNIA

AB-9535
File: 20-483137 Reg: 15082005

7-ELEVEN, INC. and ARMAN CORPORATION,
dba 7-Eleven Store #2171-13980D
301 County Line Road, Calimesa, CA 92320,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John W. Lewis

Appeals Board Hearing: February 4, 2016
Los Angeles, CA

ISSUED MARCH 10, 2016

Appearances: *Appellant:* Melissa H. Gelbart, of Solomon Saltsman & Jamieson, as counsel for appellant Chaffey Liquor LLC, doing business as Chaffey Liquor.
Respondent: Jonathan Nguyen as counsel for the Department of Alcoholic Beverage Control.

OPINION

7-Eleven, Inc. and Arman Corporation, doing business as 7-Eleven Store #2171-13980D (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] suspending their license for 10 days, all conditionally stayed, because their clerk sold an alcoholic beverage to a minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on November 4, 2009. On

[1]The decision of the Department, dated August 5, 2015, is set forth in the appendix.

February 19, 2015, the Department filed an accusation against appellants charging that, on December 14, 2014, appellants' clerk, Cheryle Ann Justice (the clerk), sold an alcoholic beverage to 18-year-old Autumn Plimmer. Although not noted in the accusation, Plimmer was working as a minor decoy for the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on June 10, 2015, counsel for appellants requested that the hearing be recorded by a videographer, who was present at the hearing and had been paid by appellants. (RT at p. 7.) Appellants argued that "videotape can capture more accurately what happened at the hearing than simply the transcript by itself" and would allow the Appeals Board to better review findings made below. (*Ibid*.)

The Department responded that Government Code section 11512(d) "is very clear on the issue that proceedings shall be reported by a stenographic reporter, and only upon consent of all parties, the proceedings may be recorded electronically." (RT at p. 9.) The Department accordingly declined to consent, noting that videographers do not go through the extensive training and certification required of stenographers; that videos can be altered; and that stenographers, unlike videographers, are required to certify the transcript is accurate and true. (*Ibid.*) Additionally, the Department noted that the Appeals Board may not make findings of fact or exercise independent judgment regarding the appearance of the decoy. (RT at pp. 9-10.)

The ALJ ultimately rejected appellants' request. He noted that it is the province of the ALJ to make findings of fact. (RT at p. 11.) Moreover, he observed that in his experience, when a proceeding is videotaped, he doesn't "get a true and accurate reading of the witnesses because they're more interested in playing to cameras." (*Ibid.*)

The administrative hearing proceeded with only a stenographic reporter.

Documentary evidence was received and testimony concerning the sale was presented by Plimmer (the decoy); by Agent Heather Castaneda of the Department of Alcoholic Beverage Control; and by Mohammed Islam, co-owner of appellant Arman Corporation.

Testimony established that on the date of the operation, the decoy entered the licensed premises and went to a cooler, where she selected a twenty-four ounce can of Coors Light beer. The decoy took the beer to the sales counter for purchase.

The decoy placed the beer on the counter. The clerk asked the decoy for identification. The decoy handed the clerk her California driver's license. The clerk took possession of the license, appeared to look at it for about five seconds, and then handed it back to the decoy. The clerk then continued with the transaction. The clerk did not ask the decoy any age-related questions. The decoy paid for the beer, received her change, and exited the store with the can of Coors Light beer.

Agent Castaneda was inside the store posing as a customer during this time and witnessed these events.

The Department's decision determined that the violation charged was proved and no defense was established.

Appellants then filed an appeal contending: (1) the ALJ erred in denying appellants' request to have the administrative hearing videotaped; (2) the ALJ abused his discretion when he failed to explain in the decision below his reasons for denying their request; and (3) the ALJ failed to proceed in the manner required by law when he held that appellants presented no evidence to prove a rule 141(b)(2) defense. The first and second issues will be addressed together.

DISCUSSION

I

Appellants contend that the ALJ erred in denying their request to videotape the administrative hearing. Appellants argue that the Department's reliance on Government Code section 11512(d) is misplaced, and that the statute only requires consent of the opposing party for use of audiorecordings, not video. (App.Br. at pp. 7-8.) Moreover, appellants contend the Bagley-Keene Act applies to administrative hearings, and requires that any person attending such a hearing has a right under Government Code section 11124.1(a) to make audio or video recordings of the proceedings.

Appellants also rely, to a large extent, on policy arguments. They argue that the California Supreme Court's decision in *Emerson Electronics*, which addressed the use of videography in depositions, applies by analogy to Department administrative hearings. (App.Br. at p. 6, citing *Emerson Electronics Co. v. Superior Ct.* (1997) 16 Cal.4th 1101 [68 Cal.Rptr.2d 883].) They argue that a videotape of the hearing could prove critical to an affirmative defense under rule 141:

> The determination of whether the minimum requirements of Rule 141 have been violated during any given minor decoy operation often turn [*sic*] on dispositive facts such as the demeanor and quality of a minor decoy (regarding Rule 141(b)(2)), a decoy's reenactment of the non-verbal response to a seller's age related question (Rule 141(b)(4)), or a demonstration of how, and where, the decoy pointed to the seller in a face to face identification (Rule 141(b)(5)). These critical elements cannot be captured through a court reporter, but can be adequately preserved through videotaping an administrative hearing.

(App.Br. at p. 5.) Appellants cite a footnote in which this Board noted the policy arguments in favor of videotaping administrative hearings: "Perhaps the time is now ripe for making digital recordings of all administrative hearings for review by the Board so

that we can decide for ourselves whether the record of evidence presented is sufficient to support findings essential to the determination of legal issues." (*Garfield Beach CVS/Longs Drug Stores Cal., LLC* (2014) AB-9178a, at p. 7, fn. 2.)

Finally, appellants contend that the ALJ abused his discretion by failing to explain in his decision why he denied appellants' request. Appellants argue that he was required by *Topanga* to make findings and to "bridge the analytic gap between the raw evidence and ultimate decision or order." (App.Br. at p. 8, citing *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515 [113 Cal.Rptr. 836].) They claim that "because there was no adequate record made by the ALJ for this Board to decide the issue on, this Board is unable to review the decision," and the entire decision should therefore be reversed. (App.Br. at pp. 8-9.)

Section 11512(d) of the Government Code dictates reporting procedures for administrative hearings: "The proceedings at the hearing shall be reported by a stenographic reporter. However, upon the consent of all the parties, the proceedings may be reported electronically."

Following appellants' request to videotape the hearing, counsel for the Department explicitly refused to consent. (RT at p. 9.) Based on the plain language of section 11512(d), "consent of all the parties" did not exist, and the law therefore mandated stenographic reporting. While this Board is certainly sympathetic to the policy arguments supporting use of video transcripts (see, e.g., *Garfield Beach CVS/Longs Drug Stores Cal., LLC*, *supra*, at p. 7, fn. 2), it does not have the authority to rewrite an unambiguous statute.

Appellants, for their part, attempt to read ambiguity into section 11512(d). At the administrative hearing, they insisted they did not seek to replace the stenographic

reporter, but merely wished to "add something in addition to it that [they] feel would create a better picture of the hearing today." (RT at p. 8.) They argued "the legislative history of [section 11512(d)] indicates that this provision was not meant to address videotaped recording but rather audio recording in lieu of the stenographic reporter." (*Ibid.*) In their brief, appellants repeat, "as provided in the legislative history of section 11512(d), the word 'electronically' refers to audio recordings and not video recordings, and therefore, Appellants would not need the consent of the Department, and the ALJ is authorized to permit the video recording." (App.Br. at p. 7.)

Appellants do not explain how the term "electronically" is sufficiently ambiguous to merit reliance on legislative history rather than the plain language of the statute. Both audio and video recording are indisputably electronic; to argue otherwise is absurd. We challenge appellants to make a functional videorecording via any means other than "electronically."

Additionally, in their brief, appellants do not cite the legislative history on which they purportedly rely. At oral argument, appellants referred this Board to a 1997 Assembly bill — one they concede was never passed — as support for their assertion that section 11512(d) addresses only audiorecordings. We have been unable to locate this language, and we have not identified any other authority that excludes videography from the term "electronically."

Moreover, the identifiable legislative history does not support appellants' interpretation of the word "electronically." Initially, section 11512(d) mandated "phonographic"[2] recording of administrative proceedings and provided no exception.

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[2]"Phonographic reporter" referred to stenographic reporter. (See 65 Ops.Cal.Atty.Gen. 682 (Dec. 31, 1982).)

(See Stats. 1945, ch. 867, § 1.) In 1978, the Attorney General issued an informal opinion concluding that the legislative directive contained in section 11512, subdivision (d) meant that ordinarily, administrative hearings could *only* be reported by stenographic reporter, but that Civil Code section 3513 allowed use of a tape recording device instead provided both parties waived their right to stenographic reporting. (See Cal. Atty. Gen., Indexed Letter, No. IL 77-181 (July 12, 1978).)

Following issuance of the informal opinion, the Office of Administrative Hearings (OAH) proceeded with an experimental program in which, upon waiver by the parties of their section 11512(d) "right" to stenographic reporting, hearings would be reported by electronic recording device. (65 Ops.Cal.Atty.Gen. 682, 685 (Dec. 31, 1982).) Parties, however, "were not waiving their 'right,'" and so OAH filed a complaint requesting a declaration

> (a) that the phrase "phonographic reporter" as used in section 11512, subdivision (d), means any means of reproducing speech which completely, accurately and comprehensibly reproduces that speech and (b) that OAH was not legally obligated to supply shorthand reporters to record and transcribe its APA hearings but instead could use electronic tape recorders operated by "monitors" trained in their use for that purpose.

(*Ibid*.) The superior court rejected OAH's request and held that OAH was precluded by the statute from using electronic recording devices to report hearings, regardless of waiver. (*Id.* at p. 687.) The Attorney General promptly issued an opinion removing the possibility of parties waiving the "right" to a stenographic reporter. (See generally *id.*)

In 1983, section 11512(d) was amended to include the present exception. (See Stats. 1983, ch. 635, § 1.) While the statute still mandates stenographic reporting, it now provides that, "upon consent of all the parties, the proceedings may be reported electronically." (Gov. Code, § 11512(d).)

Throughout its history, section 11512(d) has consistently been read to mandate stenographic reporting as the general rule, with a single exception made for electronic reporting upon consent of the parties. Appellants' uncited interpretation of the legislative history would create — apparently out of thin air — an implicit exception for *video* recordings that requires no consent. There is absolutely nothing in the legislative history to support such a tortured interpretation of an unambiguous statute.

According to the plain language of the statute, the consent of both parties is required before an administrative hearing may be reported by videorecording. Videorecording — along with audiorecording and all other recording methods that invariably depend on electricity — falls under the broad term "electronically." Because consent could not be obtained, denial of appellants' request was proper as a matter of law.

In their brief, appellants counter that the Bagley-Keene Open Meeting Act overrides section 11512(d) and grants them the right to videotape their hearing. The Bagley-Keene Act, however, does not apply to Department administrative hearings.[3] Appellants rely on Government Code section 11124.1(a), which provides:

> Any person attending an open and public meeting of the state body shall have the right to record the proceedings with an audio or video recorder or a still or motion picture camera in the absence of a reasonable finding by the state body that the recording cannot continue without noise, illumination, or obstruction of view that constitutes, or would constitute, a persistent disruption of the proceedings.

The term "state body" is explicitly defined by the Act:

> As used in this article, "state body" means each of the following:
>
> (a) Every state board, or commission, or similar multimember body of

[3]We note, however, that it *does* apply to proceedings before this Board.

> the state that is created by statute or required by law to conduct official meetings and every commission created by executive order.
>
> (b) A board, commission, committee, or similar multimember body that exercises any authority of a state body delegated to it by that state body.
>
> (c) An advisory board, advisory commission, advisory committee, advisory subcommittee, or similar multimember advisory body of a state body, if created by formal action of the state body or any member of the state body, and if the advisory body so created consists of three or more persons.
>
> (d) A board, commission, committee, or similar multimember body on which a member of a body that is a state body pursuant to this section serves in his or her official capacity as a representative of that state body and that is supported, in whole or in part, by funds provided by the state body, whether the multimember body is organized by the state body or by a private corporation.

(Gov. Code, § 11121.) A Department administrative factfinding hearing conducted by a single ALJ cannot meet the definition of "state body" provided by the Bagley-Keene Act. It is not a board, a commission, or a committee, and it is certainly not "multimember." Because a Department hearing is not a "state body," appellants do not have the right, under section 11124.1(a), to record its proceedings.

At oral argument, appellants admitted that the Bagley-Keene Act does not apply to administrative hearings, but argued instead that the policy behind the Act ought to apply by analogy. Even if this Board applied section 11124.1(a) by analogy, there is nothing in that statute that allows for the inclusion of a party-made videotape in the administrative record provided to this Board on appeal. As noted by the Department, rule 188 specifically defines the contents of the administrative record on appeal:

> The record on appeal filed with the board shall consist of:
>
> (1) The file transcript, which shall include all notices and orders issued by the administrative law judge and the department, including any proposed decision by an administrative law judge and the final decision issued by the department; pleadings and correspondence by a party;

notices, orders, pleadings, and correspondence pertaining to reconsideration;

(2) the hearing reporter's transcript of all proceedings;

(3) exhibits admitted or rejected.

(Cal. Code Regs., tit. 4, § 188.)

Based on their policy arguments, appellants seek to use the videotaped hearing as evidence in an appeal before this Board. A party-made videorecording of a hearing, however, is not an exhibit "admitted or rejected," nor is it "the hearing reporter's transcript." (*Ibid*.) It would be improper for this Board to accept such evidence on appeal.

Moreover, a stenographer is a neutral party required to submit to extensive certification requirements, including educational minimums and background checks, and must swear to the accuracy of the transcript she or he produces. (See, e.g., Bus. & Prof. Code, §§ 101, 480, 8000, 8020, 8025, 8025.1.) W here a party merely hires a videographer of its choosing, none of these assurances of neutrality exist. Additionally, the value of a party-produced videotape (for example, footage from a surveillance camera) would ordinarily be reviewed by the factfinder to determine its evidentiary value — including, among other things, whether it is authentic and unaltered. (See Evid. Code, §§ 1400-1454; see also Evid. Code, § 250 [defining "writing" to include "every other means of recording upon any tangible thing, any form of communication or representation . . . and any record thereby created, regardless of the manner in which the record has been stored"]; *People v. Rich* (1988) 45 Cal.3d 1036, 1086, fn. 12 ["A videotape is a 'writing' within the meaning of Evidence Code section 250"], citing *People v. Moran* (1974) 39 Cal.App.3d 398, 406-411 [114 Cal.Rptr. 413].) No such checks

exist where one party simply hires a videographer and passes the resulting videorecording upward for appeal.

At oral argument, appellants countered that because the videographer is being paid, he or she would have a financial incentive to produce an accurate, unbiased recording, thus alleviating any ethical concerns. We find this unpersuasive. Where a videographer is hired and paid by only one party, the financial incentive is to better serve the paying party by recording the proceedings in a manner favorable to that party's case. If a video transcript is to be relied on for purposes of appeal, it must be produced by an impartial videographer using an objective and consistent filming method, and must be subject to the court's control in the same manner as a certified stenographer.

Indeed, the primary case appellants rely on, *Emerson Electronics*, addresses nonverbal responses from a witness at videotaped *depositions*, not hearings, and explicitly acknowledges the significance of procedural oversight. (See generally *Emerson Electronics Co.*, *supra*.) At the deposition phase, both the request for discovery and the admissibility of any answers elicited during the deposition are still subject to the factfinder's supervision. In interpreting the relevant statute governing depositions, the court responded to the plaintiff's claim that "unlike trials, depositions are not subject to control by a judge." (*Id.* at p. 1110.) It found,

> Code of Civil Procedure section 2025 provides extensive safeguards against discovery abuse that do not require judicial intervention, including procedural requirements concerning who may operate the recording equipment, the nature of the area used for recording the testimony, and proscriptions against distorting the appearance or demeanor of participants in the deposition by the use of camera or sound recording techniques. [Citation.] A deponent may also interpose, on the stenographic and videotaped record, objections concerning any errors or irregularities in response to a request for a demonstration or reenactment.

[Citation.]

> Code of Civil Procedure section 2025 also permits judicial intervention. It provides that any party, any deponent, or any other affected natural person or organization may promptly move the court for a protective order, whether 'before, during, or after a deposition.' [Citation.] The court retains broad discretion to order limitations or conditions on the party seeking to carry out a videotaped reenactment to protect against "unwarranted annoyance, embarrassment, or oppression, or undue burden and expense." [Citations.] The court may also appoint a referee to preside over the deposition and rule on any objections. [Citation.]

(*Ibid.*) Again, no such checks exist where, as here, a party simply brings a privately compensated videographer to a hearing with the aim of producing additional evidence for appeal.

Additionally, we find no support for appellants' insistence that the ALJ was required to make factual findings and explain his reasoning for ruling against their videography request in the decision below. Like any motion, the request was made and addressed on record at the hearing. Department counsel explicitly opposed the request. In the absence of the Department's consent, the denial of appellants' request was proper as a matter of law under Government Code section 11512(d).

We emphasize, however, that we find merit in many of appellants' policy arguments in favor of videorecording — assuming, of course, that the recording is produced in an objective and impartial manner and in compliance with all relevant law. It is true, for instance, that it is difficult for this Board to discern clear errors in the decision below. For example, if a decision finds that a decoy was clean-shaven at the hearing, while appellants insist he in fact bore a four-inch gray beard, we would have no means of verifying the truth of appellants' assertion. Given that this Board has occasionally discovered unmistakable errors in decisions on appeal, a video transcript may indeed prove useful. Indeed, this Board has reviewed at length the arguments

surrounding the use of video transcripts and found that, on balance, a video transcript supplemented by a digitally produced printed transcript would provide an effective means of reviewing Department decisions.

On a pragmatic level, digital videorecording has progressed to the point where many early objections to its use no longer apply. For example, in the era of VHS, appellate courts found it quite difficult to review video transcripts, which essentially required a clerk to play back the entire trial at its original pace and take detailed notes, rewinding and replaying relevant portions as necessary. Early commentators observed that "[a]n appellate decisionmaker watching a video transcript is more or less limited to witness speaking speed, around 100 words per minute," while generally "[p]eople can read written transcripts about five times that fast." (Perritt, *The Randolph W. Thrower Symposium: Changing Litigation with Science and Technology: Video Depositions, Transcripts and Trials* (1994) 43 Emory L.J. 1071, 1987.) In the late 1980s, Minnesota conducted a study on the use of video transcripts, and a subsequent survey of its appellate staff revealed that

> [l]aw clerks were expected to review the entire video record as they would a printed record, to spot problems not cited or clearly articulated in the briefs, and to prepare their own statement of facts. Thus, Minnesota's procedure required a wholesale review of the record and placed a heavier burden on the appellate court.

(Grittner, *The Recording on Appeal: Minnesota's Experience with Videotaped Proceedings* (1993) 19 Wm. Mitchell L.Rev. 593, 603; see also Perritt, *supra*, at pp. 1087-1088 [noting an 80% reduction in appellate court efficiency].) Moreover, reliance on ad hoc transcription by law clerks who were not present at the hearing necessarily resulted in errors. (See, e.g., Fealk, Letter to the Editor, *Thumbs Down in High Tech?* (1989) 75 A.B.A.J. 12; see also Donovan, *Note: Deference in a Digital Age:*

The Video Record and Appellate Review (2010) 96 Va.L.Rev. 643, 658 ["[S]tenographers may improve accuracy through interpersonal interactions because 'realtime court reporters can stop the proceedings to ensure and accurate record is made.'"].)

Appellate attorneys faced a similar increase in review time — though most simply passed the hourly cost on to clients. (See, e.g., Grittner, *supra*, at pp. 603-604 ["The median time for reviewing a taped record was eleven hours, while the median for the printed transcript was four hours. . . . Sixty-three percent of appellate attorneys stated that the use of videotape increased their costs."]; but see DeBenedictis, *Excuse Me, Did You Get All That?: Electronic v. Shorthand Reporting in the Courtroom* (1993) 79 A.B.A.J. 84 ["criminal appellate lawyers who represent Kentucky indigents," and thus cannot pass on increased costs to clients, "have said it takes three to four times longer to prepare briefs from videotape"].)

Some early commentators predicted, accurately, that "[t]he continued development of technology should be treated as a fundamental assumption," and that the eventual introduction of voice-recognition software and other innovations would allow for real-time transcription, improve searchability, and alleviate much of the burden of reviewing a video transcript. (Grittner, *supra*, at p. 607; see also Donovan, *supra*, at pp. 650-651 ["What was originally bulky equipment has become less cumbersome, multiple cameras in the courtroom have ostensibly eliminated the problem of limited camera angles, and formatting advances such as DVD have made video records easier to navigate."]; Lederer, *An Environment of Change: The Effect of Courtroom Technologies On and In Appellate Proceedings and Courtrooms* (2000) 2 J.App.Prac. & Process 251, 257 ["The [video-text] dichotomy is false . . . . Modern technology now

makes available the combined text-central, multi-media court record."].)

What little additional burden remains could be reduced further by demanding specificity from appellants. Kentucky, the first state to rely solely on videotaped transcripts, partially eliminated the problem of tedious appellate review by "plac[ing] the burden on attorneys to raise all pertinent issues and to cite the applicable record. On review, the law clerks and judges looked only at the records cited in the briefs." (Grittner, *supra*, at p. 603.) Thus, any issue not directly and specifically raised and cited by an appellant — with specific reference to particular portions of the video transcript — would be ignored entirely on appeal.[4]

On the other hand, an early argument in favor of videorecorded transcripts — the alleged reduction in cost — has proven largely illusory. Early optimistic assessments of videography posited that the initial purchase cost of videorecording systems would be amortized over subsequent years of use. There are two problems with this claim. First, as noted above, the cost is largely shifted to litigants in the form of billable hours as their attorneys comb the video transcript at real-time pace. (Donovan, *supra*, at p. 653 ["[A]ttorneys will consider viewing the entire trial tape as a necessary component of ensuring all legal avenues are exhausted, which could lead to increased appellate costs across the board."].) Second, the expected window of amortization is actually much smaller than anticipated, given the rate of technological development in the area of digital recording.[5] "If, for example, a jurisdiction justified the replacement of

[4]There is, of course, the risk that particularly zealous counsel will raise as many issues as possible so that appellate staff must review the majority of the video transcript — thus slowing the appeals process and, for purposes of alcoholic beverage control, effectively delaying disciplinary action against a client's license.

[5]Moreover, "the initial amortization will not typically account for repair or maintenance expenses." (Donovan, *supra*, at p. 655.)

stenographers with video technology based on the amortization of the cost over twenty years, the technology might become obsolete before the period of amortization elapses, requiring both new equipment and training and conversion of old records." (Donovan, *supra*, at p. 654.)

Moreover, arguments for doing away with stenography cited the power of the stenographers' lobby and the unreliability of stenographic staff.[6] (See, e.g., DeBenedictis, *supra* ["No judge or court administrator who has looked favorably on electronic recording has come away without abrasions from reporters' rebuttal."]; Shelton, *Video Court Reporting — The Time Has Come* (2003) 42 Judges' J. 32 ["[A] videorecorder is always available . . . it has never called in sick, insisted on a coffee break, or asked to go to the bathroom."].) As technology developed, however, it became apparent that videorecording systems do not operate themselves — they require, at a minimum, that court staff be trained in their operation and troubleshooting, and in some cases require separate technical support expertise.[7] (See, e.g., Holiday, *Feature: Law Practice Technology: Video Hearings — An Invaluable Service or Involuntary Servitude* (1998) 77 Mich. Bar J. 418, 421 ["With video hearings, the judge loses the training and experience of the stenographer, leaving the quality of the reported proceeding to the judge's (or other operator's) ability and propensity to operate the system."]; Lederer, *supra*, at p. 1111 ["How many cameras should be installed and

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[6]Indeed, "Alaska switched to audiotaping in about 1960 because it couldn't find reporters willing to work in its frozen wilds." (DeBenedictis, *supra*.)

[7]Many of these early estimates were based on the cost savings brought about by the introduction of audiorecording in the 1960s and 1970s — a far simpler technology than modern digital videorecording. (See, e.g., DeBenedictis, *supra* ["Vermont figures it has saved $200,000 a year already by laying off three reporters in favor of tape recorders. A study in New York posits savings of $2.5 million to $3 million through a partial switch to audio."].)

who will operate them? Must every trial have a director?"]; DeBenedictis, *supra* ["Modern set-ups are replete with fail safes and are usually watched over by a specially trained court staffer."].) Moreover, we are not so naive as to believe that the stenographers' lobby would not be promptly replaced by an equally powerful videographers' lobby — one equipped with the profit-churning machine of planned obsolescence.

Any marginal increase in cost, however, pays for a tremendous increase in sensory context. A videorecording breathes life into the cold transcript. This is perhaps the strongest argument in favor of videorecorded transcripts, and one put forth by appellants.

> Text transcripts present, of course, only a small part of what actually happened at trial. Neither voice nor image is present, and their absence can be extraordinarily misleading. Even when described in the record, witness gestures and demeanor often are inadequately set forth in text. Voice intonations are absent, and except for word choice, all witnesses "sound" alike in the text transcript.

(Lederer, *supra*, at pp. 253-254; DeBenedictis, *supra* ["A proper video system should eliminate audio's speaker-identification problems, while adding the texture, nuance and you-are-there reality of television."].) One federal judge illustrated this with reference to the 1992 film *My Cousin Vinny*:

> When accused of a homicide, a character incredulously questioned "I killed (the victim)?" The typed transcript of this remark became a confession: "I killed (the victim)." Although the transcript was completely accurate in reporting the words said, it was totally inaccurate in conveying the *message* of the speaker because it did not report the intonation.

(*Riley v. Murdock* (E.D.N.C. 1994) 156 F.R.D. 130, 131, fn. 3 [1994 U.S. Dist. LEXIS 12158], emphasis in original.) Stenographic records simply cannot capture "paralinguistic features such as quality of voice . . . variations in pitch, intonation, stress,

emphasis, breathiness" and other contextual characteristics of a witness' testimony.[8] (Donovan*, supra*, at p. 657.)

We must ask, however, whether contextual information is relevant to appellate review — particularly to the limited, quasi-judicial administrative appellate review conducted by this Board. If, for example, credibility determinations are reserved for the ALJ, does the loss of testimonial context affect this Board's review? "Paralinguistic features . . . are generally not a problematic omission from the transcript if one believes that these aspects of speech are relevant to the weight and credibility given to testimony, not to its content, for appellate purposes." (Donovan*, supra*, at p. 657, internal quotation marks omitted.)

According to some commentators, granting an appellate tribunal access to the contextual information supplied by a video transcript necessarily invites improper de novo review. Indeed, early commentators suggested that the advent of videorecorded transcripts would eliminate the need for deference to lower tribunals entirely and effectively revolutionize standards of review:

> Video technology refutes the rhetoric of necessity that has long been invoked to defend traditional standards of appellate court deference to trial court decisionmaking. Appellate courts, if they so choose, now can have access via video to the same "data" that presumably inform the discretionary decisions of trial judges, and that were heretofore impossible to examine on appeal. The advent of video technology makes de novo appellate review of such trial court rulings a real possibility for the first time.

(Owen & Mather, *The Decisionmaking Process: Thawing Out the "Cold Record": Some*

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[8]We are not persuaded by the Department's response that the visual information contained in a video transcript would put agents, officers, and minors at risk. This Board routinely redacts minors' identifying information from public records. The same measures could be taken where visual identification would legitimately put an undercover officer or agent at risk.

Thoughts on How Videotaped Records May Affect Traditional Standards of Deference on Direct and Collateral Review (2000) 2 J.App.Prac. & Process 411, 412.)

The United States Supreme Court, however, has since pointed out that deference to trial court factfinding is not simply the unfortunate byproduct of technological limitations, but rather serves finality and efficiency: "The trial judge's major role is the determination of fact, and with experience . . . comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources." (*Anderson v. City of Bessemer City* (1985) 470 U.S. 564, 574-575 [105 S.Ct. 1504].)

Moreover, such deference is essential to the creation of precedent: "[D]eference to triers of fact lends a greater universality to the body of appellate decisions; fine-tuning the decisions of the trial court would lead to a diaspora of reasoning much more difficult to apply in predicting future rulings." (Hedges & Higgason, *Videotaped Statements of Facts on Appeal: Parent of the Thirteenth Juror?* (1995) 33 Hous.Law. 24, 25.)

We do not believe access to a video transcript would undermine this Board's deference to the ALJ as finder of fact. Reversal would be appropriate only where the decision below was not supported by substantial evidence. This encompasses circumstances in which the factual findings and resulting conclusions of law were based on a clearly erroneous or unreasonable interpretation of witness testimony.[9] In some cases, a video transcript could prevent our unwitting affirmation of patent injustice.

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[9]Or, in the case of a rule 141(b)(2) defense, a clearly erroneous or unreasonable interpretation of a witness' physical appearance.

We find guidance in the United States Supreme Court's much-maligned *Harris v. Scott* decision. In that case, a deputy's dashboard camera recorded his pursuit of a driver in a high-speed chase. (See *Scott v. Harris* (2007) 550 U.S. 372, 374-375 [127 S.Ct. 1769].) Ultimately, the deputy executed a maneuver to stop the fleeing driver, which was successful, but rendered the driver a quadriplegic. (*Id.* at p. 375.) At trial, the defendant deputy moved for summary judgment based on qualified immunity. (*Id.* at p. 376.) After reviewing the facts in the light most favorable to the injured driver, the District Court denied the motion, finding there were material issues of fact requiring the matter to be submitted to a jury. (*Ibid.*) The Court of Appeals in turn found that the deputy ought to have known the maneuver was unlawful, and therefore held he was not entitled to qualified immunity. (*Ibid.*)

Ultimately, the Supreme Court, *after independently viewing the videorecording* produced by the deputy's dashboard camera, held that the evidence clearly contradicted the rulings of both the District Court and the Court of Appeals. It wrote:

> There is . . . an added wrinkle in this case: existence in the record of a videotape capturing the events in question. There are no allegations or indications that this videotape was doctored or altered in any way, nor any contention that what it depicts differs from what actually happened. The videotape quite clearly contradicts the version of the story told by the respondent and adopted by the Court of Appeals.[fn.]
>
> [¶ . . . ¶]
>
> When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.

(*Id.* at pp. 378, 380.)

While the Supreme Court's reasoning is aimed at summary judgment standards,

we find it useful where, as here, an appellate body must review whether the findings of fact are supported by substantial evidence. As we have noted elsewhere,

> [T]his Board is entitled to review whether the evidence supports the findings of fact, and whether the findings of fact support the conclusions of law. (Cal. Const. art. XX, § 22; Bus. & Prof. Code § 23084, subd. (c) and (d).) If this Board observes that the evidence appears to contradict the findings of fact, it will review the ALJ's analysis — assuming some reasoning is provided — to determine whether the ALJ's findings were nevertheless proper. Should this Board be faced with evidence clearly at odds with the findings and no explanation from the ALJ as to how he or she reached those findings, this Board will not hesitate to reverse.

(*Garfield Beach CVS, LLC/Longs Drug Stores, LLC* (2015) AB-9501, at pp. 5-6.) Were this Board equipped with a digitally recorded video transcript, it would be better placed to evaluate whether the findings of fact, including those surrounding the appearance of a testifying decoy, are supported by substantial evidence.

In the absence of legislative authority, however, we cannot find error in the ALJ's refusal to allow the production of a video transcript, particularly where the videographer is paid by one party, and the other party has unequivocally exercised its statutory right to decline. Regrettably, this Board is left grappling for the warmth of context within a cold typewritten transcript.

We emphasize that our footnote in *Garfield Beach CVS* is not binding law, nor did we intend it to be. (See *Garfield Beach CVS/Longs Drug Stores Cal., LLC*, *supra*, at p. 7, fn. 2.) We do, however, reiterate our statement therein. We believe the time is ripe to permit searchable, impartial digital video transcripts of administrative hearings — but not so ripe as to drive us to ignore a duly enacted statute.

II

Appellants contend that the Department failed to proceed in the manner required by law when it certified the ALJ's decision, which held that appellants presented no evidence to "prove up" their rule 141(b)(2) defense. (App.Br. at p. 9.) Appellants note that they made explicit reference to the decoy's appearance, including "her makeup, earrings, tall leather boots, and glasses" at the hearing, her "leopard print bandana and makeup" in the photographs taken on the day of the operation, and her demeanor, confidence, and experience. (*Ibid.*)

Rule 141(b)(2) provides, "A decoy shall display the appearance which could generally be expected of a person under 21 years of age, under the actual circumstances presented to the seller of alcoholic beverages at the time of the alleged offense." The rule provides an affirmative defense, and the burden of proof lies with the party raising it. (*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.)

This Board is bound by the factual findings in the Department's decision so long as those findings are supported by substantial evidence. The standard of review is as follows:

> We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations.] We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. [Citations.] The function of an appellate Board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (*Masani*) (2004)

118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

> Appellants specifically take issue with the following conclusions of law:
>
> 5. Respondents argue that [the decoy] appeared older than 21 thereby violating Rule 141(b)(2). That argument is rejected. [The decoy] appeared and acted her true age. (Findings of Fact, ¶¶ 4 through 11)
>
> 6. Respondents [*sic*] counsel also argues that the accusation should be dismissed because [the decoy] looks older on her identification. That argument is absurd and is also rejected.
>
> [¶ . . . ¶]
>
> 8. Respondents [*sic*] counsel presented no evidence to prove up a Rule 141 defense. As Department counsel noted, Respondents could have easily brought in [the clerk] to testify if there were in fact a Rule violation since she is still employed at this store.

(Conclusions of Law, ¶ 5-6, 8.)

> The ALJ based his conclusions on the following findings of fact:
>
> 4. [The decoy] was born August 27, 1996. She served as a minor decoy during an operation conducted by Department Agents December 14, 2014. On that day [the decoy] was 18 years old.
>
> 5. [The decoy] appeared and testified at the hearing. She stood about 5 feet, 10 inches tall and weighed approximately 115 pounds. Her hair was medium length and pulled back away from her face. When she visited Respondents' store on December 14, 2014, [the decoy] wore a plaid shirt, blue jeans, and knee high brown boots. (See Exhibits 3 and 4). [The decoy's] height and weight have remained the same. [The decoy] also wore eye glasses. [The decoy] had "French tip" finger nails. At Respondents' Licensed Premises on the date of the decoy operation, [the decoy] looked substantially the same as she did at the hearing.
>
> [¶ . . . ¶]
>
> 9. [The decoy] appears her age, 18 years of age at the time of the decoy operation. Based on her overall appearance, *i.e.*, her physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and her appearance/conduct in front of [the clerk] at the Licensed Premises on December 14, 2014, [the decoy] displayed the appearance that could generally be expected of a person less than 21 years of age under the actual circumstances presented to [the clerk]. [The decoy] appeared her true age.

> 10. [The decoy] has operated as a decoy on five prior operations. She was "comfortable" during the decoy operation.
>
> 11. [The decoy] attempted to purchase alcoholic beverages at twenty-one different businesses on December 14, 2014. Nine of the businesses she visited sold her an alcoholic beverage.
>
> [¶ . . . ¶]
>
> 13. Except as set forth in this Decision, all other allegations in the Accusation and all other contentions of the parties lack merit.

(Findings of Fact, ¶¶ 4-5, 9-11, 13.)

The findings of fact in this case are unusually detailed. The ALJ explicitly addressed all of the factors appellants now complain he ignored, and made a factual finding that the decoy appeared her true age. (Findings of Fact, ¶ 9.) His conclusion of law — that appellants failed to "prove up" a rule 141 defense — is simply a summary of his findings and conclusions regarding *both* affirmative defenses appellants raised, under rule 141, subdivisions (b)(2) and (b)(5). (See Conclusions of Law, ¶ 5 [concluding rule 141(b)(2) was not violated] and ¶ 7 [concluding rule 141(b)(5) was not violated].)

Ultimately, appellants are merely asking this Board to consider the same set of facts and reach the opposite conclusion — something we cannot do.

ORDER

The decision of the Department is affirmed.[10]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[10]This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 et seq.